

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0083, State of New Hampshire v. Joseph Haniffy, the court on August 6, 2007, issued the following order:

The defendant, Joseph Haniffy, appeals his convictions on two counts of aggravated felonious sexual assault. He argues that the trial judge made three errors regarding the admissibility of evidence. We affirm.

We review a trial judge's ruling on the admissibility of evidence under an unsustainable exercise of discretion standard, State v. Goupil, 154 N.H. 208, 225 (2006). This standard applies to the trial court's decision to limit cross-examination, State v. Michaud, 146 N.H. 29, 31 (2001), to rulings regarding the doctrines of curative admissibility and specific contradiction, State v. Morrill, 154 N.H. 547, 550 (2006), and to rulings regarding the admission of impeachment evidence, State v. Soldi, 145 N.H. 571, 573 (2000).

The defendant's first argument is that when the victim testified on redirect examination that after the alleged assault she did not call her boyfriend because "[h]e and I were a new thing and it was already shaky between he and I," this opened the door to evidence that the victim and her boyfriend had engaged in consensual sex the morning of the alleged assault. Evidence of prior consensual activity between the victim and any person other than the defendant is generally inadmissible under the rape shield law. N.H. R. Ev. 412(b). In certain limited circumstances such evidence may, however, be admissible if its probative value outweighs its prejudicial effect. State v. Cannon, 146 N.H. 562, 565 (2001). The defendant also argues that the victim's answer opened the door to such evidence.

We agree with the trial court that the fact that the victim had consensual sex with her boyfriend was of little probative value concerning whether their relationship was "on shaky ground." On the other hand, that same evidence had the potential to be highly prejudicial because the jury may have drawn from it the impermissible inference that her encounter with the defendant later that day was also consensual. Moreover, the defendant was able to challenge whatever misimpression the victim gave as to her relationship with her boyfriend by eliciting from the boyfriend testimony that he thought that at the time they had an "exclusive" relationship.

The second issue is whether the trial court erred by precluding the defendant from eliciting testimony from the boyfriend that when she called him

after the assault he “thought it was a joke.” The defendant argues that the State opened the door to such testimony by eliciting from two of the State’s witnesses that when the victim reported the assault to them, they did not think it was contrived. The record, however, indicates that the boyfriend testified that when he spoke with the victim, “she wasn’t in a panic right away” and “It was relatively calm and collect [sic]. Surprised me.” When pressed about how upset the victim was, the boyfriend said that she was “not at first” upset. He also said that the victim said “she had done something she wasn’t proud of.” The defense was thus able to elicit the substance of the boyfriend’s impressions and the trial judge’s exclusion of the “joke” reference was not an unsustainable exercise of discretion.

The third issue is whether the trial court erred in denying the defendant’s motion to exclude the testimony of the codefendants, Coburn and Armstrong. Both testified under grants of immunity that the sexual encounter between them, the defendant and the victim was consensual. The State sought to impeach their versions by using their prior inconsistent statements to the police. The defendant, relying on State v. Soldi, argues that the State put the codefendants on the stand for the primary purpose of placing before the jury otherwise inadmissible substantive evidence.

We have reviewed the record and, while we are troubled by the State’s tactics, conclude that the trial judge in large part prevented the prosecution from eliciting the substance of the codefendants’ prior statements to the police. While the prosecutor left the jury with the impression that the codefendants had given statements to the police that were more inculpatory of the defendant than their trial testimony, the prior statements were not introduced into evidence and, with some exceptions, the trial judge barred the admission of the actual substance of the prior statements. Moreover, as in Soldi, the codefendants here were the only persons present other than the defendant when the assault occurred. As the defendant concedes, the State elicited probative, inculpatory substantive evidence from them. Their testimony thus contained relevant evidence other than the impeaching evidence. Soldi, 145 N.H. at 574. We conclude that the trial judge did not err in denying the defendant’s motion to exclude the testimony of the codefendants.

Affirmed.

Broderick, C.J., and Duggan and Hicks, JJ., concurred.

**Eileen Fox,
Clerk**